

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel, W.A. DREW
EDMONDSON, in his capacity as ATTORNEY
GENERAL OF THE STATE OF OKLAHOMA,
et al.,

Plaintiffs,

v.

TYSON FOODS, INC., et al.,

Defendants.

Case No. 4:05-CV-329-TCK-SAJ

**DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION OF THIRD
PARTY DEFENDANTS HOBY FERRELL (NO. 24) AND GREATER TULSA
INVESTMENTS, LLC (NO. 25) FOR DISMISSAL AND ALTERNATIVELY
FOR SEVERANCE AND STAY OF THIRD PARTY COMPLAINTS OF
DEFENDANTS/THIRD PARTY PLAINTIFFS**

COME NOW Defendants, Tyson Foods, Inc.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; Cobb-Vantress, Inc.; Cal-Maine Foods, Inc.; Cal-Maine Farms, Inc.; George's, Inc.; George's Farms, Inc.; Peterson Farms, Inc.; Simmons Foods, Inc.; and Willow Brook Foods, Inc. (collectively, "Defendants"), and, by and through their respective attorneys, hereby submit the following response in opposition to *Motion of Third Party Defendants Hoby Ferrell (No. 24) and Greater Tulsa Investments, LLC (No. 25) for Dismissal and Alternately for Severance and Stay of Third Party Complaints of Defendants/Third Party Plaintiffs*. (Docket No. 802-1) ("Motion to Dismiss")

I. ARGUMENT

1. On June 16, 2006, Third Party Defendants Hoby Ferrell and Greater Tulsa Investments, LLC ("Ferrell/GTI") filed a Motion to Dismiss in which they requested this Court to dismiss and/or sever and stay the Defendants' Third Party Complaint ("TPC") (Docket No.

80) “until resolution of Plaintiff’s claims asserted against Defendants.” *See* Motion to Dismiss at 1.

2. Ferrell/GTI request this Court to dismiss the TPC for an alleged “failure to assert a claim for relief” pursuant to Fed. R. Civ. P. 12(b)(6). *See* Motion to Dismiss at 1.

3. Ferrell/GTI filed their Motion to Dismiss after they answered the TPC. *See* April 19, 2006 Answer of Third Party Defendants Hoby Ferrell (No. 24) and Greater Tulsa Investments, LLC (No. 25) to Third Party Complaint. (Docket No. 399)

4. A party must file a motion to dismiss for failure to state a claim upon which relief can be granted *before* answering a complaint. *See* Fed. R. Civ. P. 12(b) (“A motion making any of these defenses shall be made before pleading if a further pleading is permitted.”); *accord Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 n. 2 (10th Cir. 2002).

5. Because Ferrell/GTI filed their Motion to Dismiss after filing their answer, the Motion to Dismiss should be treated as a Rule 12(c) motion for judgment on the pleadings which has the same standard of review as a Rule 12(b)(6) motion. *See id.*; *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 954 (9th Cir. 2004) (“a [FRCP] 12(b)(6) motion must be made *before* a responsive pleading. [T]he Defendants filed their motion to dismiss *after* filing their answer. Thus, the motion should have been treated as a motion for judgment on the pleadings, pursuant to Rule 12(c) or 12(h)(2).”) (emphasis in original); *and De Muria v. Hawkes*, 328 F.3d 704, 706 n. 1 (2nd Cir. 2003) (“[T]he legal standards for review of motions pursuant to [FRCP] 12(b)(6) and Rule 12(c) are indistinguishable....”).

6. Ferrell/GTI’s Motion to Dismiss provides no original argument in support of their requested relief and instead, is merely a wholesale adoption of *Third Party Defendant Wanda L. Dotson’s Motion and Brief in Support to Dismiss Third Party Plaintiffs’ Third Party Complaint*

or in the Alternative, to Sever and Stay Third Party Complaint. (Docket No. 564) (the “Dotson Motion to Dismiss”)

7. By Order dated May 31, 2006, Magistrate Judge Sam A. Joyner asked the parties to consider filing “adoptions” of previously filed briefs to reduce duplicate filings and help reduce some of the confusion that has been created in this case due to duplicate filings of the parties. *See* Docket No. 757, n. 1.

8. In compliance with Magistrate Joyner’s request, Defendants hereby submit this response in opposition to Ferrell/GTI’s Motion to Dismiss by incorporating, by reference, their *Response in Opposition to Third Party Defendant Wanda L. Dotson’s Motion to Dismiss Third Party Plaintiffs’ Third Party Complaint or in the Alternative, to Sever and Stay Third Party Complaint* (Docket No. 749) and their *Response in Opposition to the Motion and Brief of the Berry Group of Third-Party Defendants for Dismissal, and Alternatively for Severance and Stay of the Third-Party Complaint of Defendants/Third-Party Plaintiffs, Tyson Foods, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., George’s Inc., and Willow Brook Foods, Inc.* (Docket No. 775), the same as if fully set forth herein.

II. CONCLUSION

For the reasons identified in Defendants’ *Response in Opposition to Third Party Defendant Wanda L. Dotson’s Motion to Dismiss Third Party Plaintiffs’ Third Party Complaint or in the Alternative, to Sever and Stay Third Party Complaint* (Docket No. 749) and in Defendants’ *Response in Opposition to the Motion and Brief of the Berry Group of Third-Party Defendants for Dismissal, and Alternatively for Severance and Stay of the Third-Party Complaint of Defendants/Third-Party Plaintiffs, Tyson Foods, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., George’s Inc., and Willow Brook*

Foods, Inc. (Docket No. 775), this Court should deny Ferrell/GTI's Motion to Dismiss as premature, legally deficient, and unsupported by considerations of the relevant equities and efficiencies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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